

NO. 48795-1-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JENNIFER WALKER,

Appellant.

RESPONDENT'S BRIEF

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I. STATE'S RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court properly entered the judgment of conviction as there was sufficient evidence proving hit and run - injury.
2. Defense counsel was not ineffective as there were legitimate trial tactics to not calling Mr. Ortmann as a witness and the standard for requesting a missing witness instruction was not met.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO THE ASSIGNMENTS OF ERROR

1. Whether there was substantial evidence of the charge of Hit and Run-Injury when the State presented evidence of two separate individuals identifying the defendant as the driver of the vehicle?
2. Whether trial counsel provided effective assistance of counsel by making a tactical decision about witness testimony?

III. STATEMENT OF THE CASE

The State concurs with Ms. Walker's rendition of the Statement of the Case with exceptions and additions as contained within the argument below.

IV. ARGUMENT

1. THE TRIAL COURT PROPERLY ENTERED THE JUDGMENT OF CONVICTION AS THERE WAS SUFFICIENT EVIDENCE OF HIT AND RUN-INJURY.

The standard of review for a claim of insufficient evidence is after viewing the evidence in the light most favorable to the prosecution, whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Zamora*, 63 Wn.App. 220, 223, 817 P.2d 880 (1991). Additionally, the Court should afford the State all reasonable inferences. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004); *State v. Saunders*, 132 Wn.App. 592, 600, 132 P.3d 743 (2006). In such review, "circumstantial evidence is no less reliable than direct evidence [and] specific criminal intent may be inferred from circumstances as a matter of logical probability." *Id.* Lastly, the reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *See Price*, 127 Wn.App. at 202, 110 P.3d 1171; *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d. 533

(1992); *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (appellate court will not review credibility determinations).

At specific issue in the present case is RCW 46.52.020(1) which states in pertinent part, “[a] driver of any vehicle involved in an accident resulting in the injury to or death of any person...shall immediately stop such vehicle at the scene of such accident or as close thereto as possible but shall then forthwith return to, and in every event remain at, the scene of such accident until he or she has fulfilled the requirements of subsection (3) of this section...” Subsection (3) requires the following:

...the driver of any vehicle involved in an accident resulting in injury to or death of any person,...shall give his or her name, address, insurance company, insurance policy number, and vehicle license number and shall exhibit his or her vehicle driver's license to any person struck or injured or the driver or any occupant of, or any person attending, any such vehicle collided with and shall render to any person injured in such accident reasonable assistance, including the carrying or the making of arrangements for the carrying of such person to a physician or hospital for medical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person or on his or her behalf.

RCW 46.52.020(3).

Here, the evidence showed two witnesses identifying Walker as the driver of the vehicle. Mr. Wile testified he heard screeching tires at which time he walked out of his garage and observed a man and a woman in a pickup truck. Report of Proceedings at 147. Additionally, he stated the

female was driving. RP at 147. Mr. Wile testified the pickup the man and female driver where in had hit another pickup. RP at 147. Furthermore, he testified he went over to the male and female and made sure they were okay, then he went and checked on the other vehicle. RP at 147. Once he came back to first truck, the woman driver had left. RP at 147. Mr. Wile, again reiterated a woman was driving the vehicle while being shown pictures of the vehicles at trial. RP at 148. He again verified the woman was on the driver's side later in his testimony right before identifying Ms. Walker in the courtroom as the woman who was driving the vehicle. RP at 150. Following Mr. Wile's testimony was the testimony of Daniel Toste. Mr. Toste stated he saw a lady exit the Ford F250 that struck his vehicle. RP at 166. He then testified Jennifer Walker approached him and his vehicle after the collision. RP at 168. Mr. Toste identified Ms. Walker in the courtroom as the woman who approached him. RP at 168-169. He stated she even approached his vehicle in a casual manner, while chuckling or giggling. RP at 168. Mr. Toste then indicated Ms. Walker spoke to him. RP at 168. Eventually, he indicated got out of his vehicle and called the police. RP at 168. The last time Mr. Toste saw Ms. Walker was when he was on the phone with the police. RP at 171. Mr. Toste stated Ms. Walker never provided her information to him. RP at 170.

While there was limited contact between Mr. Wile and Ms. Walker and Mr. Toste and Ms. Walker, it was still sufficient for each of them to independently identify Ms. Walker at trial. Thus, there is sufficient evidence for the jury to find Walker guilty of Hit and Run - Injury.

2. DEFENSE COUNSEL WAS EFFECTIVE IN REPRESENTING MS. WALKER BASED ON STANDARD TRIAL TACTICS AND REQUIREMENTS FOR JURY INSTRUCTIONS.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that prejudice resulted from that deficiency. *Strickland v. Washington*, 446 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). The appellate court should strongly presume that defense counsel's conduct constituted sound trial strategy. *State v. Barragan*, 102 Wn.App. 754, 762, 9 P.3d 942 (2000). Thus, one claiming ineffective assistance must show that in light of the entire record, no legitimate strategic or tactical reasons support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). Prejudice is not established unless it can be shown that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 335.

Whether counsel is effective is determined by the following test: “[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?” *State v. Jury*, 19 Wn.App. 256, 262, 576 P.2d 1302 (1978) (citing *State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976)). Moreover, “[t]his test places a weighty burden on the defendant to prove two things: first, considering the entire record, that he was denied effective representation, and second, that he was prejudiced thereby.” *Id.* at 263. The first prong of this two-part test requires the defendant to show “that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” *State v. Visitacion*, 55 Wn.App. 166, 173, 776 P.2d 986, 990 (1989) (citing *State v. Sardinia*, 42 Wn.App. 533, 539, 713 P.2d 122, review denied, 105 Wash.2d 1013 (1986)). The second prong requires the defendant to show “there is a reasonable probability that, but for the counsel’s errors, the result of the proceeding would have been different.” *Id.* at 173.

“If trial counsel’s conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel.” *State v. McNeal*, 145 Wn.App. 352, 362, 37 P.3d 280 (2002). Trial counsel has “wide latitude in making tactical decisions.” *State v. Sardinia*, 42 Wn.App. 533, 542, 713 P.2d 122

(1986). “Such decisions, though perhaps viewed as wrong by others, do not amount to ineffective assistance of counsel.” *Id.* (citing *Strickland v. Washington*, 446 U.S. 668, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984)).

A. Failure to Call Witness

Generally, an attorney's decision to call a witness to testify is “a matter of legitimate trial tactics,” which “will not support a claim of ineffective assistance of counsel.” *State v. Byrd*, 30 Wn.App. 794, 799, 638 P.2d 601 (1981).

One contention raised is that counsel was unable to rebut the initial identification of Ms. Walker as the driver without Mr. Ortmann's presence. However, information was provided to the jury through Ms. Walker's testimony as to who may be the driver. RP at 212-213. Ms. Walker testified that while she was in the vehicle a woman named Lexi was driving the truck. RP at 213. Ms. Walker goes on to describe Lexi as looking quite similar to her. RP at 213. Additionally, the court allowed in testimony about Mr. Ortmann's own driving status as he was a suspended driver thus allowing defense counsel he had a bias in providing a name to law enforcement. RP at 185. Based on the instructions given, the jury had the option to find Ms. Walker's version of the events credible, which was that she was never present, only her look-a-like Lexi was there or to find the identifications provided by Mr. Toste and Mr. Wile credible. Mr. Ortmann would not have

provided any new information to the jury, thus not calling him as a witness could have been a trial tactic on the part of the defense as all reports indicate he would have further implicated Ms. Walker as the driver.

B. Failure to Request Missing Witness Instruction

The missing witness instruction may be given when a party fails to call a witness to provide testimony that would properly be a part of the case. *State v. Blair*, 117 Wn.2d 479, 485–86, 816 P.2d 718 (1991). The instruction should only be given if the evidence meets all of the following requirements: (1) the witness must be peculiarly available to the party; (2) the testimony must relate to an issue of fundamental importance as contrasted to a trivial or unimportant issue; and (3) the circumstances must establish, as a matter of reasonable probability, that the party would not knowingly fail to call the witness in question unless the witness's testimony would be damaging. *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008). Peculiarly available is further specified as meaning peculiarly within the party's power to produce. *Blair*, 117 Wn.2d at 491, 816 P.2d 718. Also, further refinement of this concept demonstrates the instruction should not be given at the request of the defense if the prosecution's missing witness was equally available to the defense to call as a witness. *State v. Reed*, 168 Wn.App. 553, 278 P.3d 203 (2012). Furthermore, the testimony must also

be more than merely cumulative. Blair, 117 Wn.2d at 489-9, 816 P.2d 718; *State v. Dickamore*, 22 Wn.App. 851, 592 P.2d 681 (1979).

Here, the basic requirements for a missing witness instruction were not met. First, the witness, Mr. Ortmann, was not peculiarly available to the State. As Ms. Walker testified, Mr. Ortmann is the person who spoke with her about the police wanting to contact her in regards to this case. RP at 215. She also testified she knew him and was in the vehicle with him the day of the incident, thus allowing the court to conclude she knows how to contact him outside of the contact information contained within the provided discovery. RP at 212-213. Also, the testimony Mr. Ortmann may have provided would have been cumulative to that which was already given. Both Mr. Toste and Mr. Wile were able to identify Ms. Walker as the driver of the vehicle. RP 150, 168. Since there was a failure to meet the requirements for giving a missing witness instruction, defense counsel was not ineffective for not requesting it be given.

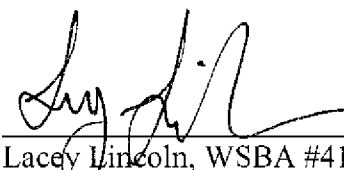
Defense counsel was not ineffective for making a tactical decision not to call Mr. Ortmann, nor to request a missing witness instruction. Thus, relief should not be granted on this ground.

V. **CONCLUSION**

Based on the preceding argument, the State respectfully requests this Court to deny the instant appeal. The jury's verdict was supported by sufficient evidence to demonstrate the appellant's guilt. Furthermore, the appellant failed to demonstrate how counsel's representation was ineffective. The State asks this Court to affirm the convictions.

Respectfully submitted this 15th day of November, 2016.

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By: 

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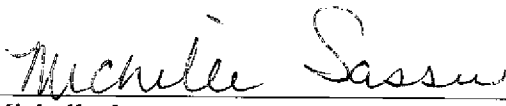
CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on Nov. 16th, 2016.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR

November 16, 2016 - 11:45 AM

Transmittal Letter

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